

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2092/1dn  
JTK:kjf:rs

November 18, 2005

Representative Berceau:

1. For this draft, I have included an appropriation but have specified "\$-0-" for expenditure in fiscal years 2005-06 and 2006-07. When you know the dollar amounts that you need to include in the proposal, contact me and I will either redraft the proposal or draft an amendment, whichever is appropriate. For the purpose of obtaining fiscal information, you may wish to request the fiscal estimate prior to introduction or request the assistance of the Legislative Fiscal Bureau.

2. Proposed s. 16.705 (5m) (f) exempts from the application of the contract review requirements created by this draft any proposed solicitation or contract to renew an existing contractual services contract under substantially the same terms and conditions, plus reasonable price adjustments necessitated by actual cost increases. I chose this wording because I understand that you are concerned primarily with the loss of existing state employee positions rather than attempting to expand the role of state employees. It seemed reasonable that an existing contract proposed for renewal would need to incorporate a reasonable price adjustment, but I thought if the price adjustment were to become excessive, it might encourage vendors to submit unrealistically underpriced proposals and then attempt to recoup lost earnings when a contract is renewed.

3. Proposed s. 15.55, which provides for appointments to be made to the proposed contract review board by members of the legislature, could raise an issue under the separation-of-powers provisions of the Wisconsin Constitution [art. IV, sec. 1 and art. V, sec. 1] because the draft places control of administrative and enforcement functions within the legislative branch. Under the separation-of-powers doctrine, a statute may not materially impair or practically defeat the proper function of a particular branch of government and the exercise of powers delegated to it. *In Matter of E.B.*, 11 Wis. 2d 175, 184 (1983). With respect to a power that is shared between branches, a statute may not unduly burden or substantially interfere with another branch's essential role and powers. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360 (1989). While a provision of the type contained in this draft is expressly prohibited under the constitutions of some states, the Wisconsin Constitution contains no express prohibition. The Wisconsin Supreme Court has indicated that in this state the separation-of-powers principle will not be applied inflexibly. The test is whether there will be an actual and substantial encroachment, rather than a theoretical bridging of

the separation of power. *J.F. Ahern v. Building Comm.* 114 Wis. 2d 69, 104 (Ct. App., 1983) as quoted in *Martinez v. DILHR*, 165 Wis. 2d 687, 697 (1992). Whether proposed s. 15.55 will be viewed by the courts as a substantial encroachment by one branch of government upon the proper function of another branch cannot be determined with certainty.

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